

CYNTHIA K. GRIFFITH
Claimant

THE BOEING COMPANY
Respondent

AETNA CASUALTY & SURETY
Insurance Carrier

[illegible]

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

The Administrative Law Judge awarded claimant a 39.5 percent work disability for a May 6, 1992, work-related upper back and right shoulder injury. Respondent agrees that claimant suffered a work-related accidental injury but contends the accidental injury only

temporarily aggravated a preexisting condition. Respondent contends claimant's recovery is, therefore, limited to medical treatment and temporary total disability benefits.

The Administrative Law Judge, in a preliminary hearing Order dated September 29, 1994, ordered respondent to pay, as an authorized medical expense, medical treatment provided by a physician claimant selected. Respondent contends this medical treatment was unauthorized, and therefore respondent was only liable for \$350 of the medical treatment as provided by the unauthorized medical allowance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

On the date of claimant's accident, May 6, 1992, claimant had been employed by the respondent for some six years and had worked for the last two years as an assembly records control coordinator. Claimant testified that approximately one year before May 6, 1992, her middle to upper back and right shoulder became symptomatic. She further testified the symptoms worsened as she continued to perform the repetitive job duties for the respondent. Finally, on May 6, 1992, claimant reported her symptoms to Boeing Central Medical.

Thereafter, respondent provided claimant with conservative medical treatment. On December 4, 1992, claimant was released from medical treatment with permanent restrictions. Claimant returned to the respondent with the permanent restrictions, and respondent notified claimant she was laid off effective December 4, 1992, because of economic reasons. Claimant was unemployed until May 11, 1995. At the time of the regular hearing, June 17, 1996, claimant remained symptomatic but was employed full time.

Nature and Extent of Disability

Claimant's job as an assembly records control coordinator required her to sort job papers and place those papers in a small four wheel cart. Claimant then transported the papers to various work stations located throughout the manufacturing plant. Claimant was required to place the job papers in pockets and then place the pockets in a panel located at the work station. Claimant testified she spent from four to six hours per work shift performing this job duty which required her to stand, twist, and bend while repetitively using her arms and hands. The balance of her work shift she was required to sort the job papers and do some data entry on a computer. Claimant testified her work activities caused her middle to upper back and right shoulder to become symptomatic. She testified the symptoms gradually worsened as she worked for approximately one year. Finally, on May 6, 1992, she reported the symptoms to Boeing Central Medical.

Boeing Central Medical then referred claimant for examination and treatment to orthopedic surgeon Paul D. Lesko, M.D. Dr. Lesko first saw claimant on May 11, 1992, with complaints of tenderness in her para scapular (shoulder blade) area and discomfort in the lower cervical segments on the right. X-rays, however, of the cervical region were normal. The doctor's first impression was inflammation of the cervical spine facettes.

Dr. Lesko prescribed physical therapy, anti-inflammatories, trigger point injections, cervical epidural injections, and the completion of a work hardening program. Claimant remained at work on light duty until Dr. Lesko took her off work on August 18, 1992. Dr. Lesko also had claimant undergo a functional capacity evaluation, MRI examination, EMG, and nerve conduction test. The MRI, EMG, and nerve conduction tests were all normal.

Dr. Lesko released claimant to return to work on December 4, 1992. Claimant remained symptomatic but Dr. Lesko testified that claimant was better at the time of her release than she was when he first started treating her. Dr. Lesko placed the following permanent restrictions on claimant:

<u>Number of repetitions per hour</u>	<u>Maximum Lift</u>	<u>Knuckle to Shoulder Lift</u>	<u>Shoulder to Overhead Lift</u>	<u>Squat Lift</u>
1. Occasionally (1 to 12 times per hour)	52 lbs.	37 lbs.	22 lbs	50 lbs
2. Frequent (13 to 62 times per hour)	37 lbs.	32 lbs.	17 lbs.	32 lbs

Although Dr. Lesko did not express an opinion as to claimant's permanent impairment of function at the time he released claimant on December 4, 1992, he did express an opinion during his July 1, 1996, deposition testimony. Dr. Lesko diagnosed claimant with sub scapular bursitis which he rated as an 8 percent right upper extremity impairment and diagnosed cervical facet syndrome resulting in a 1 to 2 percent cervical spine impairment. The doctor combined those ratings for a 6 percent whole body permanent functional impairment.

In addition to Dr. Lesko, three other physicians, orthopedic surgeons Robert L. Eyster, M.D., and Robert A. Rawcliffe, Jr., M.D., as well as physical medicine and rehabilitation physician Philip R. Mills, M.D., testified in this case. These three physicians were all appointed by the Administrative Law Judge to perform an independent medical examination of claimant. Each of these physicians saw the claimant on only one occasion.

Dr. Eyster saw claimant on September 17, 1993, and diagnosed claimant with a paravertebral muscle strain. Dr. Eyster's x-rays found some bony spurring in and around T-9 through T-11 of the thoracic spine. He opined that claimant's pain was coming from the thoracic region, secondary to the degenerative spurring. Furthermore, the doctor believed claimant's work activities only temporarily aggravated the degenerative disc disease process and that aggravation created a pain syndrome earlier than claimant would have developed naturally. In accordance with an unspecified edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Eyster opined, based on the preexisting degenerative changes in claimant's thoracic spine, that claimant's functional impairment was 3 percent. The doctor restricted claimant to no repetitive pushing or pulling over 30 times per hour.

Dr. Philip R. Mills examined and evaluated claimant on November 8, 1994. He diagnosed claimant with fibromyalgia of the right shoulder, probably secondary to overuse syndrome. The doctor defined fibromyalgia as muscle pain. Dr. Mills also gave claimant a 3 percent impairment rating but indicated his rating was to the right upper extremity which converted to a whole body impairment rating of 2 percent. His permanent restrictions were the same as Dr. Eyster's restrictions of no repetitive pushing or pulling greater than 30 times per hour.

Orthopedic surgeon Dr. Robert A. Rawcliffe was the last physician to examine and evaluate the claimant. His January 17, 1996, examination occurred almost four years after claimant's accident date of May 6, 1992. At the time of Dr. Rawcliffe's examination, claimant had worked for Ultra Modern Pool from May 11, 1995, to October 1995. Claimant testified and gave Dr. Rawcliffe a history of quitting that job because of recurrence of pain.

Dr. Rawcliffe found claimant with posterior cervical, right trapezius, and scapular area intermittent pain. The doctor concluded claimant developed this pain as a result of her work activities while employed by the respondent. He restricted claimant from engaging in strenuous physical activities involved in the use of her arms and shoulders. Lifting was restricted at mid chest height of occasionally up to 20 pounds and frequently up to 10 pounds. Also he restricted claimant from overhead work and work requiring claimant to perform in a bent forward position. Dr. Rawcliffe rated claimant's permanent functional impairment as 10 percent with 5 percent due to her preexisting condition and 5 percent due to her work activities that permanently aggravated the preexisting condition. Dr. Rawcliffe, during his deposition testimony, also attributed a portion of claimant's functional impairment rating to the work claimant performed at Ultra Modern Pool following her employment with the respondent.

Respondent argues that Dr. Eyster's medical opinion is the most persuasive and should be utilized in determining claimant's entitlement to workers compensation benefits. The respondent in accordance with Dr. Eyster's opinions asserts that claimant had a temporary aggravation of a preexisting thoracic degenerative disc disease which resulted in no permanent injury. Consequently, respondent concludes it's liability is limited to the

cost of claimant's medical treatment and temporary total disability benefits for the time claimant was taken off work by Dr. Lesko.

After reviewing all four physicians' testimony, the Appeals Board finds the most persuasive medical evidence in the record is the testimony of claimant's treating physician, orthopedic surgeon Dr. Lesko. Dr. Eyster's opinion, that claimant suffered only a temporary aggravation of her thoracic degenerative disc condition, is suspect because claimant was not symptomatic before her injury but remained symptomatic some four years after her date of accident. Dr. Mills' conclusions are not persuasive as he primarily mirrored the conclusions of Dr. Eyster. Dr. Rawcliffe's opinions cannot be used because he found claimant had further aggravated her condition from work she performed following her employment with the respondent.

The Appeals Board concludes the record supports the finding that claimant's work activities while employed by the respondent resulted in claimant suffering a 6 percent permanent functional impairment as found by Dr. Lesko. After Dr. Lesko released claimant to return to work with permanent restrictions, she was laid off for economic reasons by the respondent. After the layoff, the respondent never offered claimant a job at a comparable wage. Therefore, claimant is entitled to permanent partial general disability benefits based on a work disability, if the work disability is higher than her functional impairment. The work disability test in effect on claimant's date of accident has two components, loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. See K.S.A. 1991 Supp. 44-510e(a).

Vocational expert Jerry D. Hardin was retained by the claimant to present evidence on the issue of work disability. Utilizing Dr. Lesko's permanent restrictions, Mr. Hardin's personal opinion was that claimant had lost 25 to 30 percent of her ability to perform work in the open labor market. Mr. Hardin found claimant's wage loss was 26 percent by comparing her current ability to earn \$280 per week with an average weekly pre-injury wage at \$380.

In contrast, respondent had a vocational assessment of claimant completed by vocational expert Karen C. Terrill. Based upon Dr. Lesko's permanent restrictions, Ms. Terrill determined claimant was restricted to the medium level of work. She then concluded that claimant's labor market loss was 5 percent. Ms. Terrill found claimant had the post-injury ability to return to work earning what she had determined was a comparable wage of \$9.17 per hour. Therefore, Ms. Terrill concluded claimant had no wage loss.

The Appeals Board finds there is no reason not to give equal consideration to Mr. Hardin's 27.5 percent and Ms. Terrill's 5 percent labor market loss. Thus, the Appeals Board finds claimant's loss of ability to perform work in the labor market as a result of her work-related injury is 16 percent.

The parties stipulated to a pre-injury average weekly wage of \$560. Mr. Hardin found claimant capable of earning post-injury \$280 per week, and Ms. Terrill found claimant capable of earning \$366.80 per week. However, the Appeals Board finds claimant, at the regular hearing, was earning \$320 per week, and that weekly amount best represents her wage earning capability. The Appeals Board finds that comparing claimant's pre-injury wage of \$560 to her post-injury wage of \$320 equals a wage loss of 43 percent.

The Appeals Board, therefore, concludes that claimant is entitled to a work disability of 29.5 percent, found by averaging her labor market loss of 16 percent with the 43 percent wage loss. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

The Appeals Board notes the record established that claimant remained at work earning a comparable wage from the date of accident, May 6, 1992, until she was taken off work by Dr. Lesko on August 18, 1992. Accordingly, for this period of 14.86 weeks, claimant is entitled to disability benefits based on only her functional impairment rating of 6 percent.

Is the respondent liable for medical treatment provided by a physician selected by claimant in excess of the unauthorized medical expense allowance?

A preliminary hearing was held in this case on September 27, 1994. The claimant requested a change in the authorized treating physician to S. K. Couch, D.O., and payment of past medical treatment provided by Dr. Couch as an authorized medical expense. The Administrative Law Judge, however, in a preliminary hearing Order dated September 29, 1994, denied claimant's request for a change in physician. But the Administrative Law Judge did order respondent to pay all of the medical treatment provided by Dr. Couch to the claimant that occurred before September 17, 1993. Included in the preliminary hearing transcript was Dr. Couch's medical statement indicating he had treated claimant from October 9, 1992, through October 30, 1992, and from April 6, 1993, through June 21, 1993, for a total amount of \$1,858.50. During oral argument, respondent indicated it had paid the \$1,858.50 medical expense owed Dr. Couch as ordered.

Respondent argues its liability for the medical treatment provided by Dr. Couch to the claimant is limited to the unauthorized medical expense allowance of \$350 as provided for in K.S.A. 1991 Supp. 44-510(c). Respondent asserts it fulfilled its statutory duty to provide claimant with appropriate medical treatment to cure and relieve the effects of her work-related injury by referring claimant for treatment to Dr. Lesko. Claimant, at the preliminary hearing, testified she knew Dr. Couch was not authorized as her treating physician and that the Workers Compensation Act only obligated the respondent to pay the maximum of \$350 for unauthorized medical treatment. Additionally, the respondent argues the medical treatment provided claimant by Dr. Couch was not reasonably necessary to cure and relieve the employee of the effects of claimant's injury. Respondent

points to Dr. Eyster's opinion contained in his testimony that Dr. Couch's treatment was not medically necessary.

The Appeals Board finds the claimant requested Dr. Couch to treat her with the knowledge the treatment was unauthorized by the respondent. Additionally, respondent had already provided reasonably necessary medical treatment for the claimant's injury. Therefore, the Appeals Board finds the respondent is only responsible for the payment of the unauthorized medical expense allowance of \$350 for the medical treatment claimant received from Dr. Couch. The respondent may request reimbursement from the Workers Compensation Fund for any amount paid to Dr. Couch in excess of \$350. See K.S.A. 1997 Supp. 44-534a(b).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated March 24, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cynthia K. Griffith, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred May 6, 1992, and based upon an average weekly wage of \$560.

Claimant is entitled to 14.86 weeks of permanent partial disability compensation at the rate of \$22.40 per week or \$332.86 for a 6% permanent partial disability, followed by 15 weeks of temporary total disability compensation at the rate of \$289 per week or \$4,335, followed by 385.14 weeks of permanent partial disability compensation at the rate of \$110.14 per week or \$42,419.32 for a 29.5% permanent partial work disability, making a total award of \$47,087.18.

As of April 25, 1998, there is due and owing claimant 14.86 weeks of permanent partial disability compensation at the rate of \$22.40 per week or \$332.86, followed by 15 weeks of temporary total disability compensation at the rate of \$289 per week or \$4,335, followed by 281.57 weeks of permanent partial disability compensation at the rate of \$110.14 per week or \$31,012.12 for a total of \$35,679.98, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,407.20 is to be paid for 103.57 weeks at the rate of \$110.14 per week, until fully paid or further order of the Director.

The respondent's liability for medical treatment provided by Dr. S. K. Couch, D.O., is limited to the \$350 unauthorized medical allowance.

All remaining orders contained in the Administrative Law Judge's Award that are not inconsistent with this order are adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jim L. Lawing, Wichita, KS
Vaughn Burkholder, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director